of executors that I feel it my duty to protect an estate when I see an opportunity of preventing it from coming under the control of one who appears to me to come within that category and I am happy to think that it is in my power to place the administration of this very substantial estate in the hands of a respected trust company which can be relied upon to protect the interests of all parties.

The executor offered no explanation whatsoever as to why he did nothing from May, 1935, when the testator died until January, 1936, when he came to Singapore. He says in his affidavit that when he arrived in Singapore he ascertained that the attorneys of the deceased had continued to collect the rents of the estate which would suggest that he knew nothing about that previously. In cross-examination he stated that he assumed that they had been collecting ever since the death. Although their powers of attorney had died with the deceased he allowed them to go on collecting but he got no accounts from them. He knew there was much property in the Colony. He was a most unsatisfactory witness continually fencing with questions. First, he said that he did not remember whether he ever wrote to these attorneys. Then he said he had written a letter — then that he was in constant communication with them and that they had sent him 10,000 to 12,000 rupees since the death but he had complained that was not enough. He admitted that he did not know who are the persons entitled to benefit under the will and had taken no steps to find out. He said that he did not know that Fatima was his father's wife, presumably in order to explain his ignoring of her children but it seems clear from Mr. Tongue's evidence that he together with the rest of the family in India were very well aware that these infants were entitled to benefit under the will. One of the attorneys of deceased was convicted of perjury in connection with *inter alia* the denial of Fatima's widowship and the executor seems to have identified himself with this man. It appears probably that his interests will be antagonistic to those of these infant beneficiaries.

As a result of what I saw of the executor and the evidence as a whole I came to the conclusion that it would be disastrous to the beneficiaries as a whole if probate were granted to him. Accordingly I refused his application and granted that of the Solicitor-General. I directed that the costs of all parties of both petitions be taxed as between solicitor and client on the higher scale and paid out of the estate, there to be only one set of costs for the hearing.

Judgment accordingly.

Solicitors: *Allen & Gledhill; Sisson & Delay.*

Re TAN HOCK KEE

[O.C.J. (Adrian Clark J.) May 1, 1936]
[Singapore Bankruptcy No. 546 of 1929]

Ordinance No. 44 (Bankruptcy), s.55 — Pensions Ordinance, 1928.

The provisions of section 55, sub-section 3 of Ordinance No. 44 (Bankruptcy) cover gratuities in lieu of pensions and indeed all payments made by virtue of the Pensions Ordinance, 1928. The Court is competent to make an order under section 55 of the Bankruptcy Ordinance in respect of a gratuity awarded under the Pensions Ordinance and also in respect of a pension awarded under that Ordinance.

Semble:—Each case must be separately considered on its own merits before the making of any such order. The Court will probably take into consideration the provisions of section 17 of the Pensions Ordinance.

Semble also:—That the Official Assignee ought to make an application in most cases especially where a lump sum gratuity is to be paid to a bankrupt or to ascertain the wishes of the creditors under section 83, sub-section 2 of Ordinance No. 44 as to whether he should do so.

Semble also:—If the Official Assignee does not make any application and the creditors think that he ought to do so their proper remedy is to take action under section 83, 84 or 85 of Ordinance No. 44 (Bankruptcy).

MOTION.

C. P. Burke for the petitioning creditor in support of the motion.

E. N. Taylor for the Official Assignee.

The debtor was not represented.

The facts and arguments sufficiently appear from the judgment.

Adrian Clark J.: In this case the bankrupt was a Government servant. While still in the Government service he was adjudicated bankrupt, and after his adjudication and while still a bankrupt he retired. Before deciding whether a pension, and if so what pension, should be given to him the Government, I am informed, made enquiries in order to ascertain what attitude the Official Assignee would adopt in respect of the proceeds of any pension awarded. The Official [155] Assignee, after considering the circumstances of this particular case and having in mind the decision of the Court of Appeal in England in the case of *In re Saunders; Ex parte Saunders,* [1895] 2 Q.B. 424, stated that it was not his intention to take any action to claim the pension or any part of it. The Government then decided to award to the bankrupt his full pension and, in accordance with his election previously made under Regulation 16 of the Pensions Regulations and recorded, to award a lump sum equal to two and a half times the annual value of his full pension and an annual income of three-quarters of his full pension. Accordingly, a lump sum of $1,780 was paid by the Government direct to the bankrupt and he is now in receipt of a monthly sum, by way of pension, of $44.50. [155]

Mr. Burke on behalf of the petitioning creditor has moved the Court for an order directing the Official Assignee to make application under section 55(3) of the Bankruptcy Ordinance so that a part both of the lump-sum payment and of the monthly income should be made available for distribution among the creditors.

Mr. Burke first argued that the pension had automatically vested in the Official Assignee as the result of the provisions of section 24(4) of the Bankruptcy Ordinance read with those of section 47(1)(b)(i). Now a pension is, in law, of the nature of a voluntary gift from the Government to its former officer since, by section 5 of the Pensions Ordinance, no officer has an absolute right to such a pension. The Government need not award a pension to a bankrupt servant who retires but if it decides to do so both any lump-sum and any monthly income awarded are acquired

by the bankrupt not as personal earning but as property to which he has a claim even though it might be impossible to enforce that claim in a Court of law. *Prima facie* therefore the award of lump-sum gratuities or pensions (as distinct from periodical payments which may be stopped at any moment at the will of the donor) becomes property of the bankrupt divisible among his creditors and vesting automatically, as such, in the Official Assignee. (*Cf. Ex parte Huggins; In re Huggins,* 21 Ch. D. 85; *Ex parte Wicks; In re Wicks,* 17 Ch. D. 70; and, *Ex parte Webber. In re Webber,* 18 Ch. D. 111).

Pensions, however, are specifically dealt with in section 55 of the Bankruptcy Ordinance and I think it is clear that that section takes all the special kinds of property to which it refers out of the general scope of section 47. With great respect to the very learned Judges who decided the case of *Ex parte Huggins* I doubt whether it can be said that property dealt with in section 55 "vests" in the trustee unless and until the Court has made an order in the matter. If such property automatically vested in the Official Assignee for distribution among the creditors there could be no need for him to apply to the Court in order that the whole or any part of it should be paid to the Official Assignee; the order sought would rather be one allowing him to pay part of such property to the bankrupt.

I therefore do not agree with Mr. Burke's submission that this pension upon its award automatically vested in the Official Assignee and should therefore have been paid over to him by the Government and not to the bankrupt personally.

The next question that arises for consideration is whether this Court is competent to make any order in the matter in view of the terms of sub-section (3) of section 55 of the Bankruptcy Ordinance.

The portions of that sub-section material for present purpose may be transcribed as follows:—

> "Where a bankrupt.....is entitled to any.....pension..... granted by the Government the Court, on the application of the Official Assignee, subject to the provisions of any enactment for the time being regulating the grant and payment of pensions, from time to time make such order as it thinks just for the payment of the.....pension.....or any part thereof to the Official Assignee to be applied by him in such manner as the Court directs."

In this connection there has been cited to me the string of cases which have lately come into prominence in our local reports, namely (to take them in order of date) *Re R. E. Smith,* decided in 1923 and is now reported *supra* at p. 83 *Re Mohamed Ariff,* [1926] S.S.L.R. 166; *Re H. Daniel,* [1935] *S.S.L.R.* 81; [1935] M.L.J. 50; *Re M. Sandrasagram,* [1935] S.S.L.R. 249; [1935] M.L.J. 247; and, *Re F. A. Hendricks, supra,* at p. 89.

These decisions are material for the present purpose, I think, only in so far as their joint effect constitutes authority (which I am prepared to follow) for the proposition that there is nothing in the Pensions Ordinance, 1922 which prevents this Court from making an order under section 55(3) of the Bankruptcy Ordinance since such an order would not constitute or result in an assignment transfer attachment sequestration or levy within the meaning of section 15 of the Pensions Ordinance.

There is one other small point in this connection which may here be dealt with. Section 55(3) of the Bankruptcy Ordinance speaks only of "pensions or compensation." The lump-sum awarded under Regulation 16 of the Pensions Regulations is there referred to as a "gratuity." It is however clear that this gratuity is one "in lieu of pension" and is in fact merely a part of such pension which has been capitalised. I have no hesitation therefore in holding that the provisions of section 55(3) of the Bankruptcy Ordinance cover such "gratuities" and, indeed, all payments made by virtue of the Pensions Ordinance. (*Cf. In re Lupton, Ex parte Official Receiver,* [1912] 1 K.B. 107 at p. 116).

[156] As a result I consider that this Court is competent to make an order under section 55 of the Bankruptcy Ordinance in respect of the gratuity awarded to the bankrupt and also in respect of his pension. [156]

Mr. Burke submitted that, if that were so, the Official Assignee was under a positive and statutory duty to apply to the Court in all cases covered by section 55 of the Bankruptcy Ordinance.

Mr. E. N. Taylor, on behalf of the Official Assignee, submitted, on the other hand, that the matter was one entirely in the discretion of the Official Assignee, and, in support of this submission, he quoted section 83(4) of the Bankruptcy Ordinance, and also cited *In re Saunders, supra,* to support a contention that it would in most cases be merely a waste of time and of the assets of the bankruptcy to make an application which the Court was almost certain to refuse.

In my view the true position is this:—

In re Saunders is an authority for the proposition that whatever be the underlying intention of the authority which awards the pension it remains a matter for the Court to decide as to whether some part of that pension ought not to be taken from the pensioner for the benefit of his creditors.

In exercising that discretion the Court will on the one hand take note of the circumstances of the bankrupt, the circumstances in which his pension was awarded and the intention of the authority from whose funds the pension is derived; on the other hand the Court must, I think, remember that the bankrupt has (in most cases) caused loss to unoffending creditors by running up debts that he was unable to pay and that he should therefore justly expect to pass his years of retirement in more straightened circumstances than he might otherwise have done.

I do not think *In re Saunders* can be treated as a precedent on the facts. Each case must be separately considered and the fact that a Court of the Victorian era considered it inequitable to expect a retired Major General of the Indian Army, whatever losses he might have caused to his creditors, to live on retirement in a freehold house on less than £500 a year, does not mean that a Court at this day and in this Colony would never make an order that a bankrupt pensioner should contribute some part of his pension towards paying off his debts.

Before making any such order the Court would probably take into consideration the provisions of section 17 of the Pensions Ordinance. If any former Government officer goes bankrupt after he is in receipt of his pension that section creates procedure by which the Government can in effect allow the pensioner to enjoy his pension without any part of it reaching his creditors through the Official Assignee. The section does not, however, create analogous procedure when the officer has become bankrupt before the time arrives at which a pension may be awarded to him. On the other hand the facilities afforded to Government officers to capitalise a part of their pension is, I suppose, intended to allow or assist them on retirement to purchase or construct some residence or to buy or establish some business or undertaking or to pay some other capital sum which will lessen proportionately their future living expenses. If, instead of doing this, the bankrupt is ready to dissipate this gratuity in less worthy ways I see no inherent reason why the Court should not rather order that the whole or part of it should be paid to the Official Assignee.

I think the Official Assignee certainly has a discretion as to whether he should or should not apply to the Court under section 55(3) of the Bankruptcy Ordinance but, without wishing to limit a discretion which it is his to exercise, I think it would be wise for him to make such an application in most cases and especially where a lump-sum gratuity is to be paid to the bankrupt; or to ascertain the wishes of the creditors, under section 83(2) as to whether he should do so. If the Official Assignee does not take such action it may be said that he is in effect taking it upon himself to decide something which it should be for the Court to decide. If he does make an application to the Court it will always be open to the bankrupt to establish by affidavit (supported perhaps by a formal undertaking to the Court) that the lump-sum will be expended in a manner necessary to enable him to spend his retirement free from actual want.

If the Official Assignee does not make any application and the creditors think that he ought to do so, their proper remedy would seem to be to take action under section 83, 84 or 85 of the Bankruptcy Ordinance.

I think that in this case the procedure adopted by the petitioning creditor is misconceived and I therefore make no order on the motion presented on her behalf.

These proceedings being, I am informed, in the nature of a test case, the Official Assignee has, however, taken the precaution of also placing on the file a formal application for an order under section 55(3) of the Bankruptcy Ordinance together with an affidavit by the bankrupt in which the bankrupt appears frankly to disclose that the lump-sum gratuity of $1,780 has been expended by him in paying off certain debts (possibly created since his bankruptcy) in preference to those due under his bankruptcy.

In these circumstances I think the application filed by the Official Assignee should be proceeded with and should be heard and decided on its merits.

Order accordingly.

Solicitors: *John G. Campbell & Co.*

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[157] F.M.S. REPORTS [157]

RAJA SINGH v. CHIN FATT

[A.C.J. (Aitken J.) January 22, 1936]

[Negri Sembilan Magistrate's Civil Appeal No. 21 of 1935]

Action for damages — Negligent driving of a motor vehicle — Retention of control by the owner — Onus of proof — Misdirection by Judge or Magistrate.

Where the owner of a motor vehicle has handed over both actual possession and right of control to another person that person and not the owner is liable for any damage caused by his negligent driving.

If a Judge or Magistrate misdirects himself as to the onus of proof and places it on *A.* when it should have been on *B.*, then if he gives judgment in favour of *B.*, *A.* is entitled to a new trial unless the Appeal Court can be perfectly sure that the trial Judge or Magistrate must have come to the same conclusion of fact even had he directed himself aright as to the burden of proof.

K. K. Benjamin for the appellant.

E. Jeff for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Aitken J.: At some time in the forenoon of the 11th of July, 1935, — apparently about 9 o'clock — the defendant's motor lorry collided with the plaintiff's motor car. Both vehicles were damaged as a result of the collision, but the damage done to the car was more extensive than that done to the lorry. At the time of the accident the defendant's lorry was being driven by a certain Chin Hon, and there can be no doubt that the collision was due to his negligent driving. The defendant, however, denied liability, and the plaintiff brought an action against him in the Court of the Magistrate at Seremban claiming damages not exceeding $500 and costs. Paragraph 2 of the plaintiff's amended statement of plaint reads as follows:—

> "2. On the 11th day of July, 1935, at about the 2¾ mile on the road between Seremban to Labu, the defendant's servant or servants negligently drove the said motor lorry on to and against the plaintiff's said motor car causing it serious injury, whereby the plaintiff has suffered damage."

The defendant met this paragraph by denying "each and every allegation contained in paragraph 2 of the plaint, except that there was a collision." In my opinion this denial was not sufficiently specific, and did not clearly raise an issue as to whether or not Chin Hon was the defendant's servant. It might very well be read as denying the negligence alleged, the injury alleged, the damage alleged, and nothing more, and it was so read by learned counsel for the plaintiff. When the case came on for trial before the learned Magistrate on the 5th of September, 1935, Mr. Cross proposed that evidence should first of all be led regarding "the responsibility for the accident." Then, if the Court found in his favour on that issue, he would lead evidence as to the measure of damages. To this Mr. Jeff agreed, and Mr. Cross proceeded to lead evidence proving, quite conclusively, that the collision was due to the negligent driving of the defendant's lorry by Chin Hon. At the close of this evidence, which was not seriously challenged by cross-examination, Mr. Jeff submitted that as the defendant himself was not on the lorry at the time of the collision, and as the plaintiff had adduced no evidence to show that Chin Hon, the driver of the lorry, was the defendant's servant or agent, the defendant was entitled to judgment. To